LIBRARY
SUPREME COURT, U. S.

JUN 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1400 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

MORRIS WRIGHT
902 Whitney Bank Bldg.
New Orleans, Louisiana

SIDNEY WRIGHT
512 First City National Bank Bldg.
Houston, Texas

COBB & WRIGHT
JOSEPH V. FERGUSON II
902 Whitney Bank Bldg.
New Orleans, Louisiana

Attorneys for
Elizabeth Franzheim Reese,
Respondent

SUBJECT INDEX

	Page
SUPPLEMENTAL STATEMENT OF THE CASE	1
STATEMENT OF OPPOSITION	5
SUMMARY AND CONCLUSION	12
PROOF OF SERVICE	14

TABLE OF AUTHORITIES

Fertel, Succession of, 208 La. 614, 23 So. 2d 234 (1945)	8
Hood vs. McGehee, 237 U.S. 611, 59 L.Ed. 1144, 35 S.C. 718	5
Ledbetter, Succession of, 147 La. 771, 85 So. 908	10
Marshall vs. Pearce, 34 La. Ann. 557	11
Olmsted vs. Olmsted, 216 U.S. 286, 54 L.Ed. 530, 30 S.C. 292	5, 7

SECONDARY AUTHORITIES

Wests Federal Forms, Vol. 1, Sec. 158, page 337 et seq	12

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 1400

BENJAMIN F. KITCHEN, JR.,
Petitioner,

v.

ELIZABETH FRANZHEIM REESE.

On Petition for Writ of Certiorari to the
Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE

A. Petitioner alone among the defendants in the original proceedings who litigated by appeal and application for certiorari through the Supreme Court of Louisiana, the adverse decision of the district court, has elected to petition this Court. The trustees of the two trusts which the decedent, Mrs. Simms, attempted to establish, the executors of Mrs. Simms' will and all of the great-grandchildren of Mrs. Simms to whom she provided that the property was to pass after the death of the respective beneficiaries of said trusts, other than the petitioner, have filed no petition with this Court.

B. There is specific language in the will of Mrs. Simms, and the inter vivos trusts to which she made

reference, establishing that the testator had in mind the law of the state of Louisiana rather than that of Texas, as follows:

(1) "My daughter, Mrs. Bessie Franzheim, under the laws of the state of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said state of Louisiana, and it is my desire that she should receive this one-third." (Article XVII, will of Mrs. Simms as annexed to Petition for Probate at R. 12.)

(2) Each of the inter vivos trusts referred to in the will and to which reference is made for the rights, powers and duties of the trustees and, in connection with the trusts for the great-grandchildren, for the purpose of identifying trustees and trust properties, provides in paragraph 17 thereof that ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana". (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

C. Although it is stated at page 22 of the petition that ". . . nowhere in the will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or commit waste of the principal properties from which the income was expected to be derived. . .", each of the inter vivos trust agreements above referred to provides in paragraph 6 thereof that the trustees have the power to lease the trust property beyond the period of the trust, may borrow money on the credit of the trust estate, may mortgage the trust properties and may pledge the trust assets.

D. The decree of the Supreme Court of Louisiana is based not only upon its determination that the disputed dispositions of the decedent's will were null and void because they contained a prohibited substitution, pure and simple, but also upon an additional independent and sufficient non-federal ground, as to which the petitioner takes no issue, and which is evidenced by the following excerpt from the final decision of the Supreme Court of Louisiana, reflected, beginning at page 75, in Appendix C of the petition:

> "In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she makes a part of her will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state *this invalidated the entire will.* Succession of Ledet, 170 La. 449, 128 So. 273: and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: '. . . *where a testator refers to another writing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament . . . is invalid.*' (The emphasis has been supplied.)

> "We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are 'clothed with all the formalities prescribed for the validity of wills' where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple."

E. Petitioner, under item 2 of the caption "Jurisdiction", refers to the raising of the federal question in petitioner's brief in the Court of Appeal and to the opinion on rehearing of the Louisiana Supreme Court. As reflected in the references to the Supreme Court opinion, the constitutional complaint of the petitioner was based upon the action of the Court in invalidating the trust provisions by application of Louisiana law. It was this contention that the Supreme Court of Louisiana found to have no merit. Similarly, in Petitioner's brief in the Court of Appeal, under the caption IV thereof at page 17, the contention was that "the Court's determination that Louisiana law applied, instead of that of Texas, under which the will is valid, is inequitable, and is tantamount to a denial of the federal guaranteed rights of equal protection, U. S. Const. amend. XIV, Sec. 1, privileges and immunities, U. S. Const. art. IV,, Sec. 2." In the petition for writ of certiorari directed to the Supreme Court of Louisiana, with respect to the decision of the Court of Appeal for the Fourth

Circuit, State of Louisiana, the petitioner assigned as an error, alternatively, assuming that the disputed dispositions were inimical to the law of Louisiana, that the Court's application of Louisiana law to the case, thereby nullifying the will, abridges rights guaranteed by the United States Constitution, and complained that the Court's determination that the Louisiana law applied instead of that of Texas was inequitable and tantamount to a denial of the federal guaranteed rights. The same position was taken in the original brief of petitioner in the Supreme Court of Louisiana. It was not until the brief filed by petitioner in the Louisiana Supreme Court in support of his application for rehearing that petitioner urged the contention now made in this Court to the effect that while the Louisiana law is applicable, resort to the common law or the law of Texas should be had for the purpose of ascertaining the decedent's intention, and that the failure to do this resulted in denial of constitutional rights, as previously urged.

STATEMENT OF OPPOSITION

This controversy relates solely to a question of Louisiana law, that is, the validity and legal effect of a will of a resident of Texas, insofar as it relates to property in Louisiana, classified under the law of Louisiana as immovable, that is, real property or property in the same category as land. It is a firm, long established rule that each state is the sole mistress of the devolution of property within its borders and it is to the law of that state to which one must look for the rules which govern descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *Olmsted vs. Olmsted,* 216 U.S. 286, 54 L. Ed.530, 30 S.C. 292; *Hood vs. McGehee,* 237 U.S. 611,

59 L.Ed. 1144, 35 S.C. 718. Although these two cases involved the application of the full faith and credit clause, the principles stated are equally applicable.

Petitioner concedes the application of the Louisiana law, although it was his contention that the application of the Louisiana law resulted in the denial of constitutional rights, which the Supreme Court of Louisiana found to have no merit. Petitioner now seeks to avoid the effect of the fundamental rule of law cited above by claiming, first, that the Supreme Court of Louisiana, as a matter of conflicts of law, should have construed the will in accordance with common law terminology and, second, that it discriminated against the petitioner and thus deprived him of vested constitutional rights by failing to apply the same standards of interpreting the decedent's will as would have been used if she were a resident of Louisiana. There is a patent lack of substantial federal question in this matter, as well as a failure to raise the specific constitutional question now presented, except in a brief in support of application for rehearing. The constitutional question sought to be raised is not that passed upon as referred to in petitioner's statement in Basis for Jurisdiction.

No authority is cited to establish petitioner's contention that an interpretation by the highest court of the state with respect to the validity of a will, insofar as it affects property within that state, in accordance with the laws of that state, provides any basis for the denial of any federal right or the exercise of this Court's discretion in granting writs of certiorari. Nor is anything cited to reflect either any improper classification as between residents and non-residents under the Louisiana statute, or any opinion or action of the

Louisiana courts which in any manner discriminates when determining the validity of a will of a non-resident. The argument under article I. of the Reasons for Granting the Writ is simply an attempt to re-argue the merits of the matter and an attempt to inject into the law of Louisiana the laws of the state of Texas. The following quotation from *Olmsted vs. Olmsted,* supra, 216 U.S. at p. 295, 54 L.Ed. at page 533, and 30 S.C. at p. 295, is appropriate:

> "We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York."

As to the petitioner's contention that the decedent's intention should be determined by construing the language of the will according to the law of Texas, if there were any validity to the rule of law cited, although clearly the Louisiana courts are not required to follow it, it is the exception to that rule rather than the rule which is applicable here. The decedent clearly had in mind the law of the state of Louisiana as indicated by the references in the will and the inter vivos trusts, thus negating any presumption that as a domicilliary of Texas, she intended the will to be construed under its law. The petitioner concedes that the effect of the bequests must be determined by the law of Louisiana, even if the meaning of the language is to be

otherwise determined, and it is the legal effect of the language which the Supreme Court of Louisiana has determined invalidated the will, that is, the language of the will did not, under the law of Louisiana, leave the usufruct of the property to one and the naked ownership to another, which is the test of validity under the Louisiana law as hereinafter reflected.

As to the matter of the alleged discrimination in the manner by which the Supreme Court of Louisiana determined whether or not there was a prohibited substitution which invalidated the disputed dispositions of Mrs. Simms' will, the petitioner referred at page 14 of the petition to the Succession of Fertel, 208 La. 614, 23 So.2d 234 (1945), stating that there the husband's usufruct and his son's legitime were recognized under the terms of a will which ". . . left the property to the husband, after death to the son". Reference to that case shows that it contains in a Per Curiam, at 23 So. (2d) p. 245, a concise statement of the manner in which the Louisiana courts determine whether a testamentary disposition violates Article 1520 of the Louisiana Civil Code or is permitted by Article 1522. Further, this excerpt specifically refutes the statement that the disputed will left the property to the husband of the decedent and after his death to the son. The following quotation reflects this test and the clear distinction between the case there and the present case, in that the decedent Fertel left the *use* of the property to her husband while the decedent Simms left title to the *property* to the trustees, and at the termination of the trust, bequeathed the property to great-grandchildren who were not beneficiaries of the trusts:

"Barney Fertel is the only party who has applied for a rehearing. His contention is that the will is null in that it violates article 1520 of the Civil Code. The article provides that a testamentary disposition by which the legatee is charged with the duty to preserve the legacy for a third person, to whom the title is to pass at the death of the legatee is a prohibited substitution. According to article 1522 a bequest of the usufruct of property to one person and of the naked ownership to another is not a prohibited substitution and is therefore a valid disposition of both the usufruct and the ownership of the property. In deciding, in any given case, whether a legacy of this kind is violative of article 1520 of the Code, the only question is whether the intention of the testator as expressed in his will was to give the usufruct of the property to one person and the ownership to another, as permitted by article 1522 of the Civil Code. Each case is governed by the wording of the testament. The decisions on the subject are reviewed extensively, and compared in the Succession of Ledbetter, 147 La. 771, 85 So. 908. There is no necessity for reviewing or comparing the decisions again in this case. Here, the testatrix did not declare that she left her property to her husband, but declared that she left 'the use of it' to her husband, and that at his death it should go to her two daughters and her grandson. By the term 'the use of it' the testatrix must have meant the usufruct of the property, not the ownership of it."

It is seen that in *Fertel* the decedent left to her husband not the *property* but the *use* of it, while in Simms the bequest to the trustees was not the use of the property but the *property*.

The *Succession of Ledbetter,* 147 La. 771, 85 So. 908, which involved the will of a Louisiana decedent which was declared invalid because it violated Article 1520 of the Louisiana Civil Code, is a clear illustration of the application of the same rule to the will of a Louisiana decedent as in the present case. The following excerpts from that decision, the first of which incorporates the disputed disposition and the following two portions of which the legal principles, are pertinent:

> " 'Second. After complying with the above provisions, I wish my son, Dr. Wiltz M. Ledbetter, to have the half of remaining part of my estate or the half of the revenues therefrom during his lifetime. But should he die without an heir or child I wish his part of my estate to be paid or go to my present grandchildren, viz.: Wiltz M. Ledbetter, William V. Ledbetter and Joanna Ledbetter (children of Dr. Marion Ledbetter) and equally with these any other grandchildren that may yet be born.' "

> "The bequest in this case is as plain a substitution as can be conceived. According to article 1520 of the Code, it is absolutely null. To declare it valid, under the doctrine that the giving of property to one person during his life and at his death to another is the giving of a life usufruct to one and the naked ownership of the property to the other legatee would

be an absolute violation of article 1520 of the Code.

"Being therefore compelled now to elect whether to correct or perpetuate the error of the doctrine announced in Rice v. Key and repeated in the Succession of McDuffie, we now correct the error, and overrule those decisions in so far as they hold that the giving of property to one person during his life and at his death to another is the giving of the usufruct to one and the naked ownership of the property to the other legatee."

An early Louisiana case involving the will of a Louisiana decedent, *Marshall vs. Pearce,* 34 La.Ann. 557, also states a simple test of the prohibited substitution as follows:

"The simplest test of the substitution prohibited by our law, is that it vests the property in one person, at the death of the donor, (in case of testaments) and, at the death of such person, vests the same property in another person, who takes the same directly from the testator, but by a title which only springs into existence on the death of the first donee. Such a disposition destroys the power of alienation of the property by the first donee, because he is bound to hold it until his death, in order that the person then called to the title may take it. At the same time, no power of alienation exists in the second donee during the life of the first, because his title only comes into being at the death of the latter."

Each of the decisions referred to by the Louisiana Supreme Court, beginning at Appendix C, page 68, of the petition herein, in which the Court discussed the matter of substitutions, involved the will of a Louisiana resident, other than *Guillory* and *Meadors*. It is apparent from the foregoing that not only did petitioner not become vested with any property interest under the Louisiana law, but that there was no discrimination in the application of the Louisiana law.

As reflected in the excerpt from the opinion of the Louisiana Supreme Court at page 3, supra, there is a substantial and sufficient non-federal ground upon which the decision of the Louisiana Supreme Court, sought to be reviewed, is also based. The principle that the Court will not review a state court judgment if it appears it rests on an independent, non-federal ground, adequate to support it, is firmly established. See Comment and Authorities, Sec. 158, page 337 et seq of West's Federal Forms, Vol. 1.

SUMMARY AND CONCLUSION

The petition presents no basis for the grant of a writ of certiorari. The controversy involves the validity of a will as it relates to property within the state of Louisiana, as to which the law of Louisiana and the interpretation thereof by the Louisiana courts are controlling. The suggestion that the language of the will should be interpreted in the light of the law of Texas, although petitioner concedes that the legal effect is to be determined by the law of Louisiana, is inapplicable to the circumstances of this case because the decedent clearly contemplated the application of the law of Louisiana, and it is legal effect which has

been determined. Neither the applicable Louisiana statutes nor the application and interpretation thereof by the Louisiana courts reflect any improper classification or discrimination as between residents and non-residents of the state of Louisiana. There is clearly no substantial federal question, nor has the petitioner heretofore properly raised the specific constitutional issues now urged. Further, the substantive defect in the decedent's will resulting from the attempt to incorporate extrinsic, non-testamentary instruments, contrary to the law of Louisiana, invalidated the will, and provides a substantial and sufficient non-federal ground, as to which the petitioner has taken no issue. Accordingly, for the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MORRIS WRIGHT
902 Whitney Bank Bldg.
New Orleans, Louisiana

SIDNEY WRIGHT
512 First City National Bank Bldg.
Houston, Texas

COBB & WRIGHT
JOSEPH V. FERGUSON II
902 Whitney Bank Bldg.
New Orleans, Louisiana
Attorneys for
Elizabeth Franzheim Reese,
Respondent

PROOF OF SERVICE

I, Morris Wright, attorney for respondent, Elizabeth Franzheim Reese, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Brief of Respondent on Petition for Writ of Certiorari on:

H. Alva Brumfield and
Sylvia Roberts
509 St. Louis Street
Baton Rouge, Louisiana

and

Decatur J. Holcombe
809 First City National Bank Bldg.
Houston, Texas

counsel for petitioner, by mailing a copy thereof, postage prepaid, addressed to their offices as shown above.

New Orleans, Louisiana, this ____ day of _____, 1967.

_____

MORRIS WRIGHT